IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. _____ 76-1710

* * *

THE STATE OF TEXAS,

Petitioner

V.

UNITED STATES STEEL CORPORATION, ET AL,

Respondents

* * *

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

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THE STATE OF TEXAS,

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Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

* * *

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered February 3, 1977, in the above entitled cause.

OPINION BELOW

The opinion of the Court of Appeals, *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir. 1977), is attached to this petition as Appendix "A"; the judgment is attached as Appendix "B". The Order entered by the United States District Court for the Southern District of Texas, Houston Division, granting Petitioner access to certain grand jury transcripts in the possession or subject to the control of Defendants therein is

unreported; a copy of this Order is attached hereto as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered February 3, 1977. A timely Petition for Rehearing was denied on March 4, 1977; the mandate issued March 14, 1977. This Petition for Certiorari is filed within ninety days of the date of denial of rehearing. Leave to File a Petition for Rehearing En Banc and Recall of Mandate was denied on May 16, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a plaintiff in a civil antitrust suit may obtain through discovery grand jury transcripts of testimony of employees and former employees in the possession of or subject to the control of corporate defendants after all criminal cases resulting from the grand jury's investigation are completed.

STATEMENT OF THE CASE

The State of Texas filed this civil antitrust action against nine steel companies[1] on April 18, 1974, alleging that the Defendants had violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1-2) by conspiring to fix prices, divide markets, allocate jobs, and combine to monopolize interstate trade and commerce in the reinforcing steel materials market within Texas beginning in mid-1969.

[1]Eight of the defendants are corporations; one is a partnership. For convenience, references to "corporate defendants" will include all nine defendants.

On August 30, 1973, a federal grand jury in Houston, Texas, returned indictments that led to the criminal case styled *United States of America v. Armco Steel Corp., et al*, Cr. No. 73-H-336, in the United States District Court for the Southern District of Texas, Houston Division. The criminal antitrust case named as defendants the same nine steel companies subsequently made Defendants in the State's civil action, as well as nine individuals, all employees or former employees of the corporate defendants. The same alleged conduct formed the basis for both the criminal case and the State's civil case.

Approximately one month before the trial date of November 3, 1975, the defendants in the criminal case began entering pleas of *nolo contendere* over the objections of the Department of Justice. The case never went to trial, and was concluded on April 9, 1976, when the Honorable Judge Allen B. Hannay passed sentence upon all defendants. No appeals were taken in the criminal case; it is final as to all defendants.

During the pendency of the criminal case, the Government, pursuant to Rule 16, Fed. R. Crim. P., and in response to motions filed by certain of the corporate defendants, delivered to the attorneys for some of those defendants copies of transcripts of the testimony of employees or former employees who testified before the grand jury. (See Brief of Appellants below at 4.)

On February 3 and 4, 1976, the State attempted to take the oral depositions of Evan V. Nance, an employee of Laclede Steel Company, and of Marvin Rinn, an employee of Structural Metals, Inc. (Stipulation regarding Record on Appeal, Rec. 275). Both witnesses refused to answer all but the most routine questions on the grounds that their answers might tend to incriminate them.

On April 8, 1976, the State of Texas filed, pursuant to Rule 34, Fed. R. Civ. P., Requests for Production of Documents and Things directed to each of the Defendants requesting production, *inter alia*, of the following documents in the possession of or subject to the control of each Defendant:

> Any and all transcripts, recordings, or copies of any testimony or statements given by any person or persons before the grand jury that returned the indictments in the criminal cause styled *United States of America v. Armco Steel Corporation, et al*, Cr. No. 73-H-336, in the United States District Court for the Southern District of Texas, Houston Division. (Rec. 157-181).

After Defendants' refusal to produce the requested grand jury transcripts, and the filing of appropriate motions to compel production of said documents, the District Court on June 3, 1976, entered an Order directing all nine Defendants to provide to the State the requested grand jury transcripts (App. "C"). In that Order, Judge Seals prescribed certain protective measures whereby the grand jury documents would be kept under seal, and would be available only to attorneys for Plaintiff assisting in the preparation of the case for trial. The Court declined at that time to describe the use to which the transcripts might be put during the development of the case. Also in his Order of June 3, Judge Seals certified the order for interlocutory appeal under 28 U.S.C. §1292(b).

The United States Court of Appeals for the Fifth Circuit granted leave to appeal from the Trial Court's Order of June 3, 1976. After the submission of briefs and oral argument, the Court of Appeals reversed the Trial Court's Order. Petitioner's timely application for

rehearing was denied March 4, 1977, and the mandate issued March 14, 1977. A Petition for Rehearing En Banc and Recall of Mandate was denied by the Court of Appeals for the Fifth Circuit on May 16, 1977.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to resolve the direct conflict between the United States Court of Appeals for the Fifth Circuit and the United States Courts of Appeals for the Seventh and Ninth Circuits regarding access by civil antitrust plaintiffs to grand jury transcripts that corporate defendants have previously obtained in completed criminal actions. Furthermore, the public importance of this case cannot be overstated. As demonstrated vividly by both this case and *Illinois v. Sarbaugh*, No. 76-1690 (7th Cir. April 8, 1977), discovery of grand jury transcripts will be sought repeatedly by civil antitrust plaintiffs in the future. Especially in light of recent federal legislation authorizing State Attorneys General to bring civil *parens patriae* antitrust suits, this Court's resolution of the conflict among the Circuits is critical to the efficient and fair disposition of future antitrust enforcement efforts.

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE BUT HAS NOT BEEN DECIDED BY THIS COURT.

The Court has never directly addressed this issue of paramount public importance: The rights of a civil plaintiff in an antitrust lawsuit to have equal access to grand jury transcripts when those transcripts have

already been made available to corporate defendants and when the criminal cases are final.

Almost two decades ago, in a case where the grand jury transcripts had not been previously disclosed to anyone other than Justice Department lawyers, this Court set forth a standard of compelling necessity and required that a party seeking copies of grand jury transcripts demonstrate a particularized need for them. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). Citing *United States v. Rose*, 215 F.2d 617 (3rd Cir. 1954), the Court reiterated the traditional policy reasons underlying the general rule of secrecy of grand jury proceedings:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble, 356 U.S. at 681 n. 6. The defendants therein sought discovery of grand jury transcripts the Government had obtained in a completed grand jury investigation that had not resulted in any indictments. On those facts, the Court concluded that defendants had not demonstrated the compelling necessity and

particularized need necessary to outweigh the countervailing policy reasons shrouding grand jury transcripts in secrecy. Rather, such a showing would be made if transcripts were needed at trial to impeach a witness, refresh his recollection or test his credibility. *Procter & Gamble, Id.* at 683. This Court again in *Pittsburgh Plate Glass v. United States*, 360 U.S. 395 (1959) adopted a particularized need standard for disclosure.

Since *Procter & Gamble* and *Pittsburgh*, important changes in the Federal Rules of Criminal Procedure, in the federal statutes governing immunity, and in the Clayton Act have occurred. These changes result in an entirely new framework within which the traditional particularized need standard has been reevaluated by both district and appellate courts.

Rule 16, Fed. R. Crim. P., was amended in 1975 to expressly allow corporate defendants discovery of grand jury transcripts of employees and former employees able to legally bind the corporation. Rule 16(a)(1)(A) provides in pertinent part:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

This broadened *corporate* discovery of *individuals'* statements to the grand jury substantially alters the considerations of confidentiality and secrecy formerly attached to grand jury transcripts. A third party, the corporate entity, may now lift the veil of secrecy that previously only the witness himself could raise.

Second, the Organized Crime Control Act of 1970 authorized the Government to grant use rather than transactional immunity to persons testifying before federal grand juries. 18 U.S.C.A. §§6001-6003 (Supp. 1977). Due to continuing litigation concerning the extent of the protection afforded by use immunity, individuals granted use immunity during a grand jury proceeding have refused repeatedly to answer deposition questions based on alleged fears of self-incrimination. The record in this case provides a dramatic example of the difficulty encountered by civil antitrust plaintiffs in discovery when met by Fifth Amendment claims. (*See*, Transcript of Proceedings April 20, 1976, Rec. 124; Stipulation regarding Record on Appeal, Rec. 275). Therefore, considering the discovery problems associated with the granting of use rather than transactional immunity, it is even more essential for a plaintiff to be able to obtain copies of grand jury transcripts already in the hands of corporate defendants.

Third, recent amendments to the Clayton Act, 15 U.S.C.A. §§15c-15h (Supp. 1977) allow State Attorneys General to bring civil treble damage actions on behalf of consumers for violations of the federal antitrust laws. Although this case was not brought under these *parens patriae* provisions, it is certain that many such actions will be filed by State Attorneys General who undoubtedly will take advantage of Section 15f(b) of the amendments. That Section authorizes the Attorney General of the United States to make available to State

Attorneys General "to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action . . ." This Court should grant certiorari herein so that in the future the parties to those suits might have a clear statement of the State's rights of access to grand jury transcripts.

As demonstrated vividly by both this and the *Illinois* case discussed below, even absent *parens patriae* suits, civil plaintiffs will continue to seek discovery of grand jury transcripts. The Justice Department currently has over 100 grand jury investigations in progress. This represents a thirty per cent increase in the number of pending antitrust grand juries over the pre-felony period. Hearings on Oversight of Antitrust Enforcement Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary (May 5, 1977) (Testimony of Donald I. Baker). That civil treble damage suits will follow upon federal criminal antitrust suits is not only inevitable but also in the public interest. *See, Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955).

Access to these grand jury transcripts could determine whether secret price-fixing conspiracies will remain immune from effective private enforcement through civil treble damage suits. For these reasons, the public importance of this case mandates that the Court decide this important question of federal law.

II.

THE FIFTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH OPINIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND NINTH CIRCUITS.

The conflict between the Fifth Circuit and the Seventh and Ninth Circuits involves a fundamental disagreement over the purpose and scope of the rule of grand jury secrecy. The Fifth Circuit has taken a rigid approach that does not look to reality and the policy reasons behind that rule; the Seventh and Ninth Circuits have followed developing case law and adopted a flexible, realistic approach in balancing competing policy interests.

In *Texas v. United States Steel*, the Fifth Circuit totally rejected Texas' contention that the State had met any particularized need standard that may be a prerequisite to obtaining copies of grand jury transcripts after corporate defendants have obtained copies pursuant to Rule 16, Fed. R. Crim. P. Thirty-five days later, the United States Court of Appeals for the Seventh Circuit on almost idential facts rendered a directly conflicting decision.

The facts in *Illinois v. Sarbaugh*, No. 76-1690 (7th Cir. April 8, 1977), (a copy of which is attached as Appendix "D"), parallel those in *Texas v. United States Steel*. There, the Attorney General of Illinois had filed a civil antitrust suit following the Justice Department's criminal case that had resulted in pleas of *nolo contendere* by, among others, corporate defendants. The Illinois corporate defendants had obtained copies of certain grand jury transcripts of employees and former employees under the provisions of Rule 16, Fed. R. Crim. P. The State of Illinois sought from the Justice Department inspection and copying of the grand jury transcripts pursuant to Rule 6(e), Fed. R. Crim. P. Although in *Texas v. United States Steel* the State sought the transcripts from the Defendants, neither of the Appellate Courts attached any significance to that distinction. App. "D" at 18 n. 14. Illinois requested discovery of the grand jury transcripts prior to noticing

depositions, as did Texas. App. "D" at 14 n. 12. The defendants in *Illinois* had exchanged at least one grand jury transcript among counsel, whereas in *Texas* there was no evidence on this point other than the announcement of counsel on appeal that Defendants had voluntarily agreed not to exchange copies of transcripts.[2] In both cases, no court orders imposed restrictions on disclosure or exchange of transcripts by corporate defendants. Indeed, the Seventh Circuit did not limit its decision requiring disclosure to the State of Illinois to the exchanged transcript(s).

On appeal, the Fifth and Seventh Circuits took diametrically opposed stances. The Fifth Circuit wrote broadly on the need to preserve inviolate grand jury secrecy and declined to pay more than lip service to balancing grand jury secrecy against countervailing interests. Citing *Procter & Gamble*, the Court concluded that the secrecy of the grand jury was "indispenable" and must not be broken unless compelling necessity and particularized need are demonstrated. The Court then concluded that the State must present facts sufficient to invoke traditional standards of "particularized need" in order to obtain the requested transcripts and that the State had not made the necessary showing in this case.

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[2]Defendants' counsel herein contend that their voluntary agreement not to exchange transcripts somehow preserves grand jury secrecy. The ninth Circuit's remarks on the similar situation in *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18, 23 n. 1 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965) are instructive on this point:

> Counsel for petitioners assert that they alone, not their clients, had access to the memorandum. But knowledge of opposing counsel in itself prejudices respondents. Moreover, petitioners' counsel were not precluded from conveying what they learned from their inspection of the memorandum to their clients.

In contrast, the Seventh Circuit followed the balancing procedure adopted in *U. S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965) (a copy of which is attached as Appendix "E"), and analyzed the facts in the *Illinois* case to determine whether the need for disclosure to civil plaintifs outweighed the policy reasons for continued secrecy of grand jury transcripts once the grand jury investigation is complete and the criminal cases arising therefrom are final. Both Circuits agreed that the secrecy of the grand jury proceedings is not absolute in nature, and indeed that the requisite particularized need or compelling necessity to be shown by one seeking access to grand jury transcripts should be related to the policy reasons underlying the original secrecy requirement. As the Ninth Circuit stated, "In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large, compelling need." *Id.* at 21. The Seventh Circuit concluded in *Illinois* that the facts therein required only a limited showing of particularized need that could be "sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury." App. "D" at 16. This holding directly conflicts with the Fifth Circuit's decision to deny disclosure to the State in the Texas case.

Finally, absent a decision from this Court, procedural chaos will result from the conflicts among the Circuits on this issue. If past experience is any guide, many antitrust suits brought not only by State Attorneys General but also by private plaintiffs, will be involved in

multi-district litigation. Decisions allowing plaintiffs in some districts to obtain copies of grand jury transcripts which the corporate defendants have already obtained during prior completed criminal cases, *U. S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); *Illinois v. Sarbaugh*, No. 76-1690 (7th Cir. April 8, 1977); *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108 (N.D. Ill. 1974); *Connecticut v. General Motors Corp.*, 1974-2 Trade Cases paragraph 75,138 (N.D. Ill. 1974); *In re Arizona Dairy Products Litigation*, 1976-1 Trade Cases paragraph 60,910 (D. Ariz. 1975), which conflict with decisions denying plaintiffs access in other districts, *Texas v. United States,Steel Corp.*, 546 F.2d 626 (5th Cir. 1977); *see, Baker v. United States Steel Corp.*, 492 F.2d 1074 (2d Cir. 1974), must be reconciled to prevent forum shopping and to provide uniform rules with regard to scope of discovery in multi-district litigation.

The Fifth Circuit's rigid approach to disclosure of grand jury transcripts directly conflicts with that of the Seventh and Ninth Circuits. The latter two Circuits have evolved an eminently flexible and sensible approach to grand jury secrecy that looks to the underlying policy reasons for the secrecy rule, and balances them against competing interests. Certiorari should issue to resolve this conflict.

CONCLUSION

For the foregoing reason, a writ of certiorari should issue to reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lee C. Clyburn, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioner. I hereby certify that two copies of the foregoing Petition have been served on counsel of record for Respondents by mailing true and correct copies thereof on this 1st day of June, 1977, by Certified Mail, Return Receipt Requested.

LEE C. CLYBURN
Administrative Assistant
Attorney General

APPENDIX A

The STATE OF TEXAS
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION, Laclede Steel Company, Bethlehem Steel Corporation, the Ceco Corporation, and Structural Metals, Inc., Defendants-Appellants.

A-3

No. 76-2781.

United States Court of Appeals,
Fifth Circuit.

Feb. 3, 1977.

Appeal from the United States District Court for the Southern District of Texas.

Before MORGAN and GEE, Circuit Judges, and HUNTER,* District Judge.

GEE, Circuit Judge:

*Senior District Judge for the Western District of Louisiana, sitting by designation.

United States Steel Corporation, et al.,[1] are defendants in an antitrust suit filed by the State of Texas on its behalf and on behalf of "all similarly situated political subdivisions and tax-supported institutions within the State of Texas" alleging that the defendants violated the Sherman Act[2] and § 15.04(a) of the Texas Business and Commerce Code. As a part of its discovery program Texas sought from the defendants grand jury subpoenas, schedules, notices, summonses or other documents requesting the attendance of any person and the production of any documents and transcripts of testimony by employees of defendants before the federal grand jury that returned indictments in *United States of America v. Armco Steel Corporation, et al.*, Criminal Action No. 73-H-336, in the United States District Court for the Southern District of Texas.[3] Each defendant had obtained transcripts of testimony by its own employees pursuant to a motion filed in the criminal action under Fed.R.Crim.P.

---

[1]Defendants in the antitrust case are United States Steel Corporation, Laclede Steel Company, Bethlehem Steel Corporation, The Ceco Corporation, Structural Metals, Inc., Armco Steel Corporation, Border Steel Rolling Mills, Inc., Texas Steel Company, and Schindler Brothers Steel. The first five defendants are appellants in this case; all defendants except the partnership Schindler Brothers Steel are corporations. In our discussion of discovery we employ the term "corporations" for convenience to indicate all entities entitled to discovery of their employees' testimony under Fed.R.Crim.P. 16(a)(1)(A).

[2]15 U.S.C. §§ 1-2 (1970).

[3]The same alleged conduct formed the basis of both the criminal case and the state's civil case. One of the criminal cases went to trial; all defendants pleaded *nolo contendere* to the indictment.

16(a)(1)(A).[4] All the defendants agreed not to share the transcripts with one another, and there is no claim or indication that this has been done. After the defendants refused to surrender the documents and transcripts, the state's motions to compel production were granted by the trial court in an order directing all nine defendants to provide the State of Texas with the documents and transcripts. The court prescribed protective measures in his order that sealed the grand jury documents, limiting their availability solely to the state's attorneys for their assistance in the preparation of the case for trial. He also certified the order for interlocutory appeal under 28 U.S.C. § 1292(b) (1970), granted leave to appeal, and stayed the effect of his order pending disposition of the appeal.

[1] The issue presented is whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case.[5]

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[4]Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

[5]A secondary issue, which we do not reach, is whether, assuming production of the documents was properly ordered, the district court was obliged to undertake an *in camera* inspection of the material produced in order to limit disclosure to relevant portions of it.

[2] Once again we must undertake the "delicate task of balancing the policy which requires secrecy for the proceedings of the grand jury with the policy which requires that there be full disclosure of all available evidence in order that the ends of justice may be served." *Allis-Chalmers Manufacturing Co. v. City of Fort Pierce*, 323 F.2d 233, 238 (5th Cir. 1963). Yet we must balance the scales with our thumb on one pan: it is not the facts but the trial judge's exercise of discretion that we weigh; and we may reverse only if we decide that he abused that discretion in granting discovery. *See Allis-Chalmers, supra* at 241. Notwithstanding, we conclude that in this case the trial judge erred.

> In *Allis-Chalmers*, we held that:
> [D]isclosure of grand jury testimony is properly granted where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. Disclosure even in these circumstances must be closely confined to the limited portions of the testimony for which there is found to be a particularized need.

323F.2d at 242. The State of Texas' principal position here is that factual peculiarities in this case and the general policy favoring discovery distinguish the particularized need test of *Allis-Chalmers*, so that no showing of such need is requisite in this instance. A subsidiary argument is that the corporate defendants' discrete possession of portions of the relevant documents provides sufficient particularized need to justify discovery under *Allis-Chalmers*. The argument runs that only when grand jury secrecy is threatened does the particularized need test come into play and that only an attempt to discover the transcripts *from the grand jury* or those under the imposed silence of Fed.R.Crim.P.

6(e)[6] significantly threatens grand jury secrecy. When the corporate defendants have the collective transcripts in their several possessions, Texas argues, that secrecy cannot be threatened because it has already been breached, and normal discovery rules should apply.

[3] The State underrates the importance of and misconceives the reasons for the cloak of grand jury secrecy: although several reasons exist,[7] the one most

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[6]Fed.R.Crim.P. 6(e) provides:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

[7](1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Proctor & Gamble Co., 356 U.S.677, 681 n.6,78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958), *citing United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954).

pertinent to this case is the desire to create a sanctuary, inviolate to *any* intrusion[8] except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation. When the witness obtains his own transcript, this ground of grand jury secrecy remains unaffected. The State concedes as much in admitting that, absent a showing of particularized need, it could not hope to obtain civil discovery from an individual witness merely because he had obtained the transcript of his own testimony. By this concession the State recognizes that requiring such disclosure would in some degree compromise the effectiveness of the grand jury. In such a case the issue, of course, would be whether this diminishment of effectiveness was warranted in the particular instance by some special consideration: particularized need. We conclude that similar arguments justify the appellants' present reliance on this policy to protect them from discovery in the absence of a showing of particularized need.

As noted, the State attempts to avoid the requirement of a showing of particularized need, a requirement that it admits would apply in the case of an individual witness, by the claim that disclosure to the corporate defendants has already breached grand jury secrecy. It is said that disclosure of a corporate employee's testimony to his employer sufficiently breaches the wall of grand jury secrecy by creating fears of retaliation in

[8]For example, in the Ninth Circuit case of *United States Industries v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965), the court invoked the particularized need test to restrict discovery from the court of a presentence report that made references to grand jury testimony.

the corporate employee[9] as to dispense with the particularized need requirement.

This argument ignores the usual case in which corporate spokesmen (for the corporation, by necessity, must rely on its employees to do its talking) appear before a grand jury representing and speaking for the corporation, indeed in a real sense are the corporation, on such an occasion. When the corporation, in such a case, acquires transcripts of its spokesmen's testimony, it acts in a capacity little different from an individual defendant who seeks his own transcript.[10] Moreover, we have previously noted the "weighty considerations favoring corporate discovery" of the testimony of corporate employees. *See United States v. Hughes*, 413 F.2d 1244, 1251-52 (5th Cir. 1969). To impose upon that discovery the consequence for which Texas here contends—automatic discoverability in civil proceedings—would restrict unduly the corporation's use of the criminal defense tool which Congress saw fit to grant in Fed.R.Crim.P. 16(a)(1)(A).

[9]In fact, Congress recognized the implications of corporate discovery on grand jury secrecy but concluded, as we did previously in *United States v. Hughes*, 413 F.2d 1244 (5th Cir. 1969), that fairness to the corporate defendant overrode fears that retaliation might cause a corporate employee to limit his grand jury testimony. *See* Joint Explanatory Statement of the Committee of Conference [1975] U.S.Code Cong. & Admin.News, pp. 713, 715-16.

[10]Although in this case the corporations indicted are also those subject to the civil suit, the state's argument also applies to those corporations whose employees' testimony may aid the grand jury in proceeding against other corporate violators. The defendant partnership, though conceptually less of an independent entity than the corporate defendants, is equally obliged to speak through human agents.

We must bear in mind the Supreme Court's language in *United States v. Proctor & Gamble*, 356 U.S. 677, 681-82, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958):

> [W]e start with a long established policy that maintains the secrecy of the grand jury proceedings in the federal courts. . . . The reasons are varied. One is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tommorrow. *This 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity.* There are instances when that need will outweigh the countervailing policy. *But they must be shown with particularity.* (citations and footnotes omitted, emphasis supplied).

In the face of this teaching, we are not free to adopt any such broadcast rule of automatic discovery as that for which Texas contends.

To be sure, the appearance before a grand jury of a corporate employee or even a corporate officer may not be in the capacity of corporate spokesman. The testimony of a hostile or disaffected employee may well be a special case and this circumstance a factor in the calculus of particularized need. But Texas' bold and broad assault neither notes nor regards such narrow considerations, and no distinction on any such basis is attempted before us. It is to be whole hog or none, and none it is.

[4] Our journey is not ended, however, for the trial court invoked the language of *Allis-Chalmers* in his grant of discovery:

> This Court is of the opinion that Plaintiff's request does fall within the parameters of *Allis-Chalmers*, and that Plaintiff has shown a compelling need if only by virtue of the fact that the testimony is in the possession of Defendants.

The invocation of *Allis-Chalmers*, however, does not establish its applicability. *Allis-Chalmers* requires the party seeking discovery to invoke the trial judge's discretion by seeking use of the grand jury testimony "to impeach a witness, to refresh his recollection, to test his credibility and the like," *See Proctor & Gamble, supra* at 682, 78 S.Ct. 983. The general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. Texas must draw a finer bead.[11]

REVERSED.

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[11]Having disposed of the discovery issue adversely to the plaintiffs, we pretermit discussion of whether the trial court should have employed *in camera* inspection before granting discovery.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-2781

D. C. Docket No. CA-74-H-533

THE STATE OF TEXAS,

Plaintiff-Appellee,

versus

UNITED STATES STEEL CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before MORGAN and GEE, Circuit Judges, and HUNTER,* District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

FEBRUARY 3, 1977

ISSUED AS MANDATE: MAR 14 1977

**Senior District Judge for the Western District of Louisiana, sitting by designation.*

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE STATE OF TEXAS, Plaintiff vs. UNITED STATES STEEL CORPORATION, ET AL., Defendants	§ § § § § § § § § § §	CIVIL ACTION NO. 74-H-533

MEMORANDUM AND ORDER:

This cause of action is before the Court on Plaintiff's Motion to Compel Production of Documents and Things, Defendants' Motion for Protective Order, and Plaintiff's Motion to Maintain Class Action.

Plaintiff has made a motion for production of certain grand jury testimony used in a criminal action, *United States of America v. Armco Steel Corp., et al.*, Criminal No. 73-H-336 (S.D. Tex., April 9, 1976), which is directly related to this civil action. The testimony sought is that which was made available to Defendants for their use in the criminal action and which they will presumably use in this civil case. Defendants, in opposing Plaintiff's request, cite the decision of the Court of Appeals in *Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Florida*, 323 F.2d 233 (5th Cir. 1963). There it was held that grand jury testimony is available to a civil litigant

> where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. Disclosure even in these circumstances must be clearly confined to the limited portions of the testimony for which there is found to be a particular need.

Id. at 242. This Court is of the opinion that Plaintiff's request does fall within the parameters of *Allis-Chalmers*, and that Plaintiff has shown a compelling need if only by virtue of the fact that the testimony is in the possession of Defendants. Thus the Court is of the opinion that Plaintiff is entitled to the materials which it seeks, but the Court is also of the opinion that Defendants are entitled to some of the protective provisions that they have requested. It is certainly reasonable for Plaintiff to be required to maintain confidentiality in the use of the grand jury testimony, but in making protective provisions, the Court is not, at this time, going to prescribe the uses to which the testimony may be put. Therefore, in regard to Plaintiff's Motion to Compel Production of Documents and Things, and Defendants' Motion For Protective Order, it is hereby ORDERED as follows:

1. United States Steel Corporation, Bethleham Steel Corporation, Border Steel Rolling Mills, Inc., The Ceco Corporation, Laclede Steel Company, Schindler Brothers Steel, Structural Metals, Inc., Texas Steel Company, and Armco Steel Corporation are each ordered and directed to produce the following documents at the offices of the Attorney General of Texas, Supreme Court Building, Austin, Texas, on or before 12:00 noon, June 7, 1976, and to allow the State of Texas, by and through its Attorney General, to inspect and copy same:

A. Any and all subpoenas, schedules, notices, summons, or other document of whatsoever description that ordered, directed, or requested the presence or attendance of any person or persons, or the production of any documents or tangible things, before the grand jury that returned the indictments in the criminal action styled *United States of America vs. Armco Steel Corporation, et al.*, Criminal No. 73-H-336, in the

United States District Court for the Southern District of Texas, Houston Division.

B. Any and all transcripts, recordings, or copies of any testimony or statements given by any person or persons before the grand jury that returned the indictments in the ciminal cause styled *United States of America vs. Armco Steel Corporation, et al.*, Criminal No. 73-H-336, in the United States District Court for the Southern District of Texas, Houston Division.

2. All such transcripts and records to be produced shall be kept under seal;

3. all such transcipts and records shall be held confidential and disclosure thereof shall be

A. Limited to only Plaintiff's attorney-in-charge and other counsel of record of Plaintiff in this case and such other attorneys of the office of the Attorney General of the State of Texas actually assisting such counsel of record in the preparation and trial of this case,

B. Plaintiff's counsel as above set forth shall not disclose or divulge in any manner any portion of, or information in, the transcripts and records to any persons or entities other than such Plaintiff's counsel,

C. All Defendants' counsel shall be notified in writing of the name of any person described in sub-section A above to whom disclosure is made, and

D. All such Plaintiff's counsel to whom disclosure is made shall acknowledge in writing that he or she has read a copy of this order.

In regard to Plaintiff's Motion to Maintain Class Action, the Court is of the opinion that in all probability the motion is well taken and that this cause of action

should proceed as a class action. The Court is not ruling on the motion at this time because in the hearing held on April 20, 1976, Plaintiff's counsel made certian representations concerning agreed orders to be submitted in regard to the class action motion. Transcript at 11-13. Therefore, Plaintiff's counsel shall inform the Court of the progress of these or any other matters bearing on the class action motion, and at such time as Plaintiff's counsel is of the opinion that the motion for maintenance of a class action is ripe for a decision then he shall so inform the Court and a ruling shall be made.

Lastly, because of the numerous and vigorous objections made by Defendants to the discovery sought by Plaintiff,s the Court, on its own motion, is hereby certifying this order for an interlocutory appeal under 28 U.S.C. § 1292(b). The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

Done at Houston, Texas this 3rd day of June, 1976.

S/S Woodrow Seals
United States District Judge

APPENDIX D

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 76-1690

STATE OF ILLINOIS,

Petitioner-Appellant,

v.

JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

Respondent-Appellee,

J. L. SIMMONS COMPANY, INC., et al.,

Intervenors-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois, Danville Division,
In re Grand Jury Proceedings
No. CR-72-67-D—Henry S. Wise, *Judge.*

ARGUED DECEMBER 1, 1976—DECIDED APRIL 8, 1977

Before CUMMINGS and TONE, *Circuit Judges,* and

GRANT, *Senior District Judge.**

TONE, *Circuit Judge.* This is an appeal from an order of the District Court for the Eastern District of Illinois refusing to permit inspection and copying of grand jury transcripts. Inspection is sought by the State of Illinois, plaintiff in a private treble-damage antitrust action pending in the Southern District of Illinois, for use in connection with that action. Among the defendants in that action are nine corporations indicted by the Eastern District grand jury who, during the pendency of the now-concluded criminal action, obtained copies of the transcripts pursuant to Rule 16(a)(1)(A), Fed. R. Crim. P. We decide that those corporations may intervene in the proceeding, that the order denying inspection is appealable, and that the state should have access to the transcripts subject to certain conditions.

The Criminal Case in the Eastern District

The indictment in the Eastern District charged the corporate defendants, highway construction contractors, and four of their officers with violating § 1 of the Sherman Act, 15 U.S.C. § 1, by submitting rigged bids to the State of Illinois and allocating among the corporate defendants projects let by the state in connection with the construction of an interstate highway. The Eastern District court's inspection order directed the Department of Justice to permit the attorneys for each of the corporate defendants to inspect and copy the transcripts of the grand jury testimony of

*The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

present or former employees of the corporation who had power to bind it with respect to business activity which was the subject of the indictment. Rule 16(a)(1)(A), Fed. R. Crim. P. Disclosure was made pursuant to the order. Subsequently all the defendants entered pleas of *nolo contendere*, which were accepted, and judgments were entered and sentences were imposed. The grand jury has long since been discharged.

The Civil Case in the Southern District

The state's treble-damage action in the Southern District was based on the same facts and sought recovery of overcharges resulting from the alleged conspiracy. In addition to the nine companies charged in the Eastern District indictment, five other highway construction companies were named as defendants. The state moved for an order requiring John E. Sarbaugh, Chief of the Antitrust Division's Midwest Office, to produce for inspection and copying grand jury transcripts which had been disclosed to any defendant in the criminal proceeding in the Eastern District, to any defendant in the civil case, or to any person not an attorney or staff member of the Department of Justice. The state also served a request to produce copies of the transcripts on each of the defendants in the civil case and subsequently sought an order compelling production of the copies. The court denied relief, holding that the transcripts were outside the jurisdiction of that court because they related to a grand jury proceeding in another district. The court added:

> "No expression is intended by this Order on the merits of those requests, only on the matter of the jurisdiction of this Court."

The Proceeding Below

The state then petitioned for the same relief against

respondent Sarbaugh in the Eastern District, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. His response to the petition raised no objection. The state served notice of this petition on the corporate defendants, and, upon their objections to disclosure, the District Court held a hearing at which the corporate defendants were allowed, without objection, to appear and be heard. The District Court then, in the order appealed from, denied the petition, holding that the requisite particularized showing of compelling necessity had not been made. The court, however, ordered the transcripts transferred to the Southern District so they would be available for disclosure by that court if a sufficient showing of necessity were made during the trial.[1]

The court also denied a motion by the state for production of documents, in which it sought to inspect all subpoenas and documents in the custody of respondent Sarbaugh which had been collected by the Eastern District grand jury in connection with its highway industry investigation. Respondent Sarbaugh was ordered, however, to return all corporate documents in his possession to the defendants, so those

[1]The District Court said:

> "The Court believes that it would be entirely proper for petitioner to move for production of the requested transcripts at the time of the trial of the civil suit to use for purposes of impeachment, refreshing recollection and challenging credibility of those witnesses who had previously testified before the grand jury. At that time petitioner would be in a position to establish compelling need, for example, by pointing to a failure of memory on the part of a witness, a showing of contradiction between the testimony and reliable documentary evidence or perhaps by prevailing upon the trial court for an *in camera* examination of the transcripts to uncover any inconsistencies."

documents would be available for discovery by the state.[2] The ruling on the motion to produce documents is not challenged on appeal.

The objectors, designating themselves intervenors and appellees, have moved to dismiss the appeal, and the state has moved to strike the appearances of the intervenors. Both motions were ordered taken with the merits.

Consistent with his position before the District Court, respondent Sarbaugh does not oppose the relief sought by the state. Only the intervenors oppose that relief.

I. *Intervention*[3]

The state contends that the corporations resisting disclosure of the transcripts should not be considered intervenors because they did not comply with the requirements of Rule 24(c), Fed. R. Civ. P., when they appeared in the District Court. Any right the state may otherwise have had to rely on this failure was lost, however, when it did not object on this ground in the District Court. *Cf. Klein v. Nu-Way Shoe Co.*, 136 F.2d 986,989 (2d Cir. 1943); see 3B *Moore's Federal Practice* paragraph 24.12[1] at 24-504 (1975). In fact, in the District Court the state asserted no objection whatsoever to the intervenors' appearance. By notifying them of the

[2]The policy of grand jury secrecy obviously had a much more limited application to the subpoenaed documents than it did to grand jury transcripts. See *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).

[3]Normally we would consider first the issue of our jurisdiction. Here, because the motion challenging the appealability of the District Court's order was filed by the intervenors, not the named defendant, it is convenient to consider their status before ruling on their motion. We would of course be required to consider the issue of our jurisdiction whether or not it was raised by a party.

petition, failing to object to the order inviting them to appear, and never raising any question of their right to appear, the state waived any objection to their intervention.

In any event, we think the objecting defendants were entitled to intervene. The Third Circuit reached the opposite result in a *per curiam* opinion in *United States v. American Oil Co.*, 456 F.2d 1043, 1044 (1972), framing the issue as one of standing and stating that the criminal proceeding had terminated, "the order to produce was not directed to the defendants," and "[t]he government's right in such a situation is not before us." This court, however, in *In re Special February 1971 Grand Jury v. Conlisk*, 490 F. 2d 894 (7th Cir. 1973), decided on its merits a challenge to a disclosure order by witnesses before the grand jury who sought to prevent disclosure of their testimony for use in proceedings against them before a board of inquiry of the Chicago Police Department. The policemen were of course not only parties to the board proceeding but, unlike intervenors here, were themselves witnesses before the grand jury.[4] Yet, if the Third Circuit's reasoning had been applied, they would have lacked standing. Similarly, in *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963), a witness before the grand jury was given leave to intervene in the district court for purposes of opposing disclosure of his testimony and was heard in this court. While the standing issue appears not to have been raised in either *Special February 1971 Grand Jury* or *Holovachka* and was not mentioned in either opinion, there would have been no case before the court in the absence of standing, so the failure to dismiss either appeal is not without significance. Nevertheless, it is appropriate to state our reasons for differing with the Third Circuit.

[4]Rule 16(a)(1)(A), however, treats grand jury testimony by certain corporate employees as though the corporation itself had been the witness.

Under Rule 6(e), Fed. R. Crim. P., disclosure of occurences before the grand jury by attorneys and other described persons may be made "only when so directed by the court." Although the rule does not say so specifically, the reference must be to the court of the district in which the grand jury was convened.[5] See *Gibson v. United States*, 403 F.2d 166, 167 (D.C. Cir. 1968). It is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of the grand jury proceedings.

Rule 6(e) also omits to state whether any one is entitled to object to disclosure. As respondent Sarbaugh points out, however, the rule seems to contemplate a proceeding of some kind, judicial proceedings are not normally *ex parte*, and persons in the situation of the intervenors are likely to be the only ones to object to an order for disclosure. If they are not allowed to appear, the advantages of an adversary proceeding are lost.

Applying the standards governing intervention in civil cases, the intervenors have an interest sufficient to satisfy the requirement of standing and to entitle them to intervene. See Rule 24(a)(2), Fed. R. Civ. P. It is true, as the state points out, that the reasons underlying the policy of secrecy do not include protection of indicted

[5]We do not imply disapproval of the procedure adopted by the District Court in this case of transferring the transcripts to the District in which the trial was to be held, so that court can make determinations of particularized need during trial, which the transferor court is not in a position to do. In a case in which the secrecy of the transcripts had not already been partially breached, see Part III, *infra*, and there is a likelihood that a particularized need will arise during trial, that procedure would be eminently sensible and, we believe, within the power of the court in which the grand jury is convened. *Cf. Baker v. United States Steel Corp.*, 492 F.2d 1074, 1076-1077, 1078 (2d Cir. 1974); *Gibson v. United States*, 403 F.2d 166, 167-168 (D.C. Cir. 1968).

persons. See *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-682 n.6 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (majority, 405 (Brennan, J., dissenting) (1959); *In re Special February 1971 Grand Jury v. Conlisk, supra*, 490 F.2d at 895-896. Indicted persons now defending a civil action involving the same facts are, however, among those who would be adversely affected by disclosure of the information, and therefore should have a right to be heard,

Finally, at least if the civil case is pending before the court of the district in which the grand jury was convened,[6] essentially the same issue of whether the transcripts which were made available to defendants in the criminal case are subject to discovery for use in the civil case can alternatively be presented in the civil case itself, as it was, for example, in *Proctor & Gamble, supra.* See also *State of Texas v. United States Steel Corp.*, No. 76-2781 (5th Cir. Feb. 3, 1977), Slip Op. at 1333. The right of the defendants in the criminal case to be heard on the issue of disclosure should be the same in either proceeding.

The motion to strike intervenors' appearances as appellees in acordingly denied.

II. *Appealability*

As we have noted, Rule 6(e), Fed. R. Crim. P., vests jurisdiction to release the grand jury transcripts in the United States District Court for the Eastern District of Illinois. The instant petition was filed there as an independant proceeding after the discharge of the grand jury and the termination of the criminal action initiated

[6]See text at note 5, *supra*. Plaintiff at bar asked the court in the civil case to order the defendants to produce copies but that court declined to act on the ground that it lacked jurisdiction. See the summary of the proceedings below, *supra*.

by the indictment. This subsequent independent proceeding was terminated by the District Court's order denying the petition, which "disposes of the contentions of all the parties, leaving nothing else to be decided," "ends the controversy before" the District Court, and is therefore appealable under 28 U.S.C. § 1921. *United States v. Byoir*, 147 F.2d 336,337 (5th Cir. 1945); *Gibson v. United States, supra*, 403 F.2d at 167. Compare, *United States ex rel. Hi-Way Electric Co. v. The Home Indemnity Co.*, No. 76-1242 (7th Cir. Feb. 11, 1977), Slip Op. at 5. An order refusing disclosure (as in *Gibson)* was distinguished for purposes of appealability from one that grants disclosure (as in *Byoir*) in dictum in *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1078 (2d Cir. 1974). In that case the court held unappealable both an order of disclosure by the court to which grand jury transcripts had been transferred and the transferor court's order of transfer. Compare, however, Judge Lumbard's dissent in that case and *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973).[7]

Our conclusion that the order is final is not altered by the transfer of the documents to the Southern District of Illinois for possible future disclosure in the proceeding pending there. That a court of another jurisdiction in another case may ultimately grant part of the relief denied by the order on the basis of a particularized need appearing later does not render interlocutory an order effectively terminating the proceeding in the Eastern District. We therefore deny the motions to dismiss the appeal.

[7]Our case is distinguishable from *Baker* on its facts, and the majority there did imply that an order denying discovery may be appealable even though one granting it is not. Nevertheless, the rationale of the majority does not appear to be in harmony with the view we have adopted.

III. *The Merits*

Disclosure authority is granted the court in broad terms in Rule 6(e): disclosure outside the criminal proceeding may be made "preliminarily to or in connection with a judicial proceeding." The Supreme Court has declared that the secrecy protected by Rule 6(e) "must not be broken except where there is a compelling necessity," which "must be shown with particularity." *United States v. Proctor & Gamble Co., supra,* 356 U.S. at 682; *Pittsburgh Plate Glass Co. v. United States, supra,* 360 U.S. at 399-400.This standard may have "been eroded to some extent," *Baker v. United States Steel Corp., supra,* 492 F.2d at 1080 (Lumbard, J., dissenting), by language in *Dennis v. United States,* 384 U.S. 855,869-871 (1966), if not by decisions of lower federal courts led by *U.S. Industries, Inc. v. United States District Court,* 345 F.2d 18,21 (9th Cir.), *cert. denied.* 382 U.S. 814 (1965), which held that when the reasons for the policy of secrecy "do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need."[8] Accord, *In re Cement-Concrete Block, Chicago Area, Grand Jury, Proceedings,* 381 F.Supp. 1108 (N.D.Ill. 1974); *State of Connecticut v. General Motors Corp.,* 1974-2 Trade Cases Paragraph 75,138 (N.D. Ill. 1974); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases Paragraph 60,910 (D. Ariz. 1975). Compare also *In re Special February 1971 Grand Jury v. Conlisk , supra,* 490 F.2d 894, with *In re Holovachka, supra,* 317 F.2d 834. However, this may be, there still exists in civil cases and cases in which disclosure is not provided for as a matter of right in 18 U.S.C. § 3500(e)(3) and Rule 16(a)(1)(A), Fed. R. Crim. P., a requirement that the party seeking disclosure show a need commensurate with the degree of secrecy remaining and the policy reason that justifies protecting that secrecy. The state concedes as much in the case before us.

[8]In *U.S. Industries* the Ninth Circuit permitted discovery in a civil antitrust action of a presentence memorandum containing "information within the purview of the grand jury secrecy provision of Rule 6(e) . . . ." The court found that only one of the policies behind grand jury secrecy was applicable, "that of insuring untrammeled disclosure by *future* grand jury witnesses." (Emphasis in original.) Inasmuch as the witnesses' employers had already inspected the government report, however, the court found that minor redactions in the document could avoid any adverse impact on future grand jury witnesses. The court then permitted discovery of the document, because of its view that it would be "highly inequitable and averse to the principles of federal discovery to allow one party access to a government document and not the other" *Id.*, 345 F.2d at 23.

The level of need has been said to diminish as the reason for preserving secrecy becomes less compelling. *U.S. Industries, Inc. v. United States District Court, supra,* 345 F.2d at 21; see also *State of Illinois v. Harper & Row Publishers, Inc.,* 50 F.R.D. 37,41 (N.D. Ill. 1969). When a grand jury has completed its work and the criminal proceedings initiated by its indictment have been concluded, several of the reasons for secrecy, see *United States v. Proctor & Gamble Co., supra,* 356 U.S. at 681 n.6, no longer remain.[9] The reason that survives the grand jury's term and the criminal proceeding is the need to protect the grand jury witnesses from

[9]In *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 234 (1940), the Court said that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." While this statement may appear to have been limited by *Proctor & Gamble* and *Pittsburgh Plate Glass,* it was quoted with approval in *Dennis,* 384 U.S. at 870.

retaliation, lest witnesses before future grand juries be inhibited by the knowledge "that the secrecy of their testimony [may] be lifted tommorrow." *United States v. Proctor & Gamble Co., supra,* 356 U.S. at 682. That is what we are concerned with here.

In an antitrust context, the force of this reason is considerably diminished by the disclosure pursuant to Rule 16(a)(1)(A) to the witness' corporate employer, who has greater incentive and power to retaliate than anyone else. Once the employer has the transcript, all that remains of the reason for secrecy is the need to protect the witness, to the extent it is still possible to do so, from potential adverse affects on his future relationships with members of the industry other than his employer. This residual need cannot be dismissed as unworthy of any consideration, *cf. Pittsburgh Plate Glass Co. v. United States, supra,* 360 U.S. at 400, but it can be adequately dealt with by a protective order.

One additional factor will sometimes narrow the remaining zone of secrecy and further dilute what remains of the reason for secrecy. As illustrated in this case by the disclosure of transcripts by at last one of the intervenors to a co-defendant, the need of joint defendants to cooperate in their common defense will often lead to further disclosures within the group of defendants in the criminal case and sometimes to those who may be added in the civil case. Such further disclosure may, of course, be restricted by court order[10] or, as in *State of Texas v. United States Steel Corp.,*

[10]We recognize that Rule 6(e) includes the provision, "No obligation of secrecy may be imposed upon any person except in accordance with this rule." The rule also provides, however, that the court may permit disclosure "preliminarily to or in connection with a judicial proceeding," an authority which, we believe, includes the power to prohibit one receiving disclosure pursuant to that authority from making any further disclosure that is not required in connection with that judicial proceeding.

supra, No. 76-2781, Slip Op. at 1334, by voluntary agreement among the defendants not to share the transcripts. When transcripts are shared, however, the group of potential retaliators who do not know of the grand jury testimony is reduced and so is the importance of maintaining secrecy.

We are not persuaded, however, by the state's argument, supported by *State of Connecticut v. General Motors Corp., supra,* 174-2 Trade Cases Paragraph 75,138, that all secrecy was lost in the case at bar as a result of the unconditioned orders for disclosure to the intervenors when they were defendants in the criminal case. Even though those corporations were not restrained by the terms of the orders from disclosing the transcripts indiscriminately, they received disclosure in the exercise of their rights under Rule 16(a)(1)(A) and for use in preparing the defense of the criminal case. Given this and the unlikelihood that the corporations would make further disclosures not related to the defense of litigation, we think there remained a residual secrecy deserving of some protection.

Having considered what remains of the reason for secrecy in the case at bar, we turn to the level of particularized need that must be shown to warrant disclosure. Usually, if not invariably, a need for disclosure arises from a litigant's interest in securing accurate and truthful testimony from witnesses. *E.g., Dennis v. United States, supra,* 384 U.S. at 872-873. Courts have generally recognized, as the District Court did in the case at bar, that the trial testimony of a witness may give rise to a particularized need for a grand jury transcript of his testimony for use in

impeaching him or refreshing his recollection.[11] *United States v. Proctor & Gamble Co., supra*, 356 U.S. at 683. Deposition testimony may also give rise to such a need. *Atlantic City Electric Co. v. A. B. Chance Co.*, 313 F.2d 431 (2d Cir. 1963), cited with approval in *Dennis*, 384 U.S. at 870 n.15; *State of Illinois v. Harper & Row Publishers, Inc., supra*, 50 F.R.D. at 40-42. If a witness is required to testify publicly about matters previously dealt with in his grand jury testimony, there is little to be said for not allowing the use of his earlier testimony to assure the accuracy of his later testimony. See *Baker v. United States Steel Co., supra*, 492 F.2d at 1079.

The unfairness of permitting one side "to have exclusive access to a storehouse of relevant fact" was another factor bearing on need which was given explicit recognition in *Dennis*, 384 U.S. at 873. See also *U.S. Industries, Inc. v. United States District Court, supra*, 345 F.2d at 23; *In re Cement-Concrete Block, Chicago Area, supra*, 381 F.Supp. at 1111. While *Proctor & Gamble and Pittsburgh Plate Glass* teach us this factor is not decisive, it is to be weighed with the degree of secrecy remaining and the possibility of guarding by protective order the interests that secrecy serves to protect.[12]

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[11]Whatever *Dennis* left of the requirement that a defendant in a federal criminal case show a particularized need to obtain the transcript of a prosecution witness' grand jury testimony, see 384 U.S. at 871-874, was swept away by the amendment of 18 U.S.C. § 3500(e), part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 926 (1970).

[12]Another factor enhancing the particularized need in the case at bar, although we believe a sufficient showing has been made without it, is the lapse of time between the events in issue and the testimony the witnesses will give in depositions or trial. *Cf. Dennis v. United States, supra*, 384 U.S. at 872. The grand jury testimony was

(Footnote continued on following page)

The remaining question is whether, in order to establish particularized need, it must also be shown that the witness' trial or deposition testimony is inconsistent with his grand jury testimony or that his memory has faltered or failed with respect to a matter he was able to recall before the grand jury. If this is necessary, need cannot be shown without the intervention of a judge to read and compare, *in camera*, the earlier and later testimony. This has been the traditional practice for both trial, see *Dennis v. United States, supra*, 384 U.S. at 874, and deposition, see *Atlantic City Electric, supra*, and *Harper & Row*,[13] *supra*, testimony and is the procedure for which the government argued in *Dennis*. The Supreme Court, however, found it inadequate in the following words:

> "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in

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[12] *continued*
given during 1972. While some of the delays in pretrial proceedings in the civil case are chargeable to the plaintiff, it understandably would wish to postpone taking the deposition of a witness until it had exhausted the possibility of obtaining his grand jury transcript for use in connection with the deposition. The degree of plaintiff's responsibility for delay is not comparable to that in *Barker v. United States Steel Corp., supra*, 492 F.2d at 1079.

[13]In *Harper & Row* the trial judge, having found discrepancies and memory failures with respect to the depositions of a number of witnesses from his *in camera* inspection of their grand jury testimony, ordered transcripts of other witnesses' grand jury transcipts disclosed to the plaintiffs. *Id.*, 50 F.R.D. at 42.

> impeaching a witness'. *Pittsburgh Plate Glass*, 360 U.S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 874-875.

Although *Dennis* was a criminal case, the quoted passage seems equally applicable to civil cases. Moreover, when the *in camera* procedure is invoked for deposition testimony, an intolerable burden is often placed on district judges, *cf. State of Illinois v. Harper & Row Publishers, Inc., supra*, 50 F.R.D. at 40-42.

Given the residual reason for secrecy in a case such as this, we believe that a particularized need for the limited disclosure we prescribe below is sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury.

The restrictions upon the disclosure which we adopt to protect the remaining limited interest in secrecy are suggested by Judge Robson's opinion in *Cement-Concrete Block, supra*, 381 F.Supp. at 1110.

> "[T]his danger may be obviated by limiting the disclosure to the attorneys of record [in the treble-damage case] for use in that litigation only for the purposes of impeachment, refreshing the witness' recollection and testing credibility."

To aid in enforcing this condition, the District Court should release the transcripts to a single attorney for plaintiff and require him to keep and ultimately file with the court a log showing to whom and when each transcript or portion thereof has been shown. To these restrictions should be added a prohibition against copying and a requirement that the transcripts be returned when they are no longer needed for the prescribed use. See *State of Illinois v. Harper & Row Publishers, Inc., supra*, 50 F.R.D. at 40.Compare *Manual for Complex Litigation*, Part II, Appendix 2.20 (amended 1975). In addition, if a defendant contends that a portion of any transcript has no bearing on any issue in the private antitrust action, that contention may be presented to the District Court in a motion to withhold that portion from disclosure.

Two recent cases in other circuits dealing with the private antitrust plaintiff's right to grand jury transcripts deserve mention. The Second Circuit, in *Baker v. United States Steel Corp., supra*, 492 F.2d at 1076 n.2, 1079 (majority), 1080-1081 (Lumbard, J., dissenting), has said that grand jury secrecy should not be breached for general discovery purposes. Yet the court recognized that disclosure is appropriate.

> "to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony"

492 F.2d at 1079, citing, among other authorities, *State of Illinois v. Harper & Row Publishers, Inc., supra*, 50 F.D.R. at 37. Our decision is consistent with the limitation and the quoted language.

The other case, *State of Texas v. United States Steel Corp., supra*, No. 76-2781, Slip. Op. at 1333, was decided

after oral argument of the case before us. There the Fifth Circuit denied the State of Texas, as plaintiff in a treble-damage antitrust action, unlimited access to copies of transcripts from a related grand jury investigation which were in the possession of the defendants themselves.[14] The court's conclusion appears to rest on an analogy between the situation in which "the witness obtains his own transcript," and, that in which the corporation receives the transcript of its spokesman. The fear-of-retaliation reason for preserving secrecy, said the court, "remains unaffected" in the first situation, a point which the state conceded; and the rule should be the same in the second. We are not sure the reason for secrecy does remain unaffected when the individual witness is sued or sues in a civil case, but, asuming that it does, we question the analogy. As we have noted, when a corporation receives disclosure of its employee's grand jury testimony, disclosure has been made to the most likely source of retaliation. Surely this affects the need for secrecy and, we believe, allows what remains of that need to be satisfied by conditions in the disclosure order. The Fifth Circuit did recognize that the state might well have some inspection rights but required it to "draw a finer bead," so the disparity in the results that would be reached by that court and ours may not be as great as it appears at first.

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[14]The Fifth Circuit attached no significance to the fact that the materials were sought from the defendants in the civil case rather than the prosecutor in the criminal case. Nor do we, See notes 5 and 6, *supra*. We note, however, that in view of the continuing public interest in maintaining the effective functioning of future grand juries, the Attorney General, as the officer charged with protecting that interest, will be entitled to oppose disclosure and therefore should receive notice or motions for disclosure in civil cases to which the government is not a party.

We therefore reverse the order of the District Court and remand the case for further proceedings consistent with this opinion.[15] The District Court for the Southern District of Illinois should return the transcripts to the District Court for the Eastern District of Illinois, upon the latter's request, to permit compliance with the mandate of this court.

REVERSED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[15]In view of the inconsistency between our views on the issues on intervention and appealability and on the merits and those expressed in certain opinions of other circuits, this opinion has been circulated among all judges of this court in regular active service. The judge would disqualify himself from any consideration of this case. No judge favored a rehearing in banc on any issue.

APPENDIX E

U.S. INDUSTRIES, INC., et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR the SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, et al., Respondents.

No. 19619.

United States Court of Appeals
Ninth Circuit
April 7, 1965

Petition for writ of prohibition and/or writ of mandamus by which petitioner sought to reseal a government memorandum which the District Court had determined to be a proper object of federal discovery proceedings. The Court of Appeals, Barnes, Circuit Judge, reviewed the memorandum, and having examined documents in camera as trial court might have done, it deleted such portions of memorandum as it deemed necessary in respect to policy considerations behind rule of secrecy of grand jury investigations.

Petition denied.

1. Grand Jury — 41

Rule relating to secrecy of proceedings and disclosures before grand jury is not limited only to protection of actual transcript of grand jury proceedings. Fed. Rules Crim. Proc. rule 6(e), 18 U.S. C.A.

2. Grand Jury — 41

Conjectural estimates of plaintiffs in civil antitrust action as to extent to which government memorandum

prepared for criminal antitrust suits reflected grand jury proceedings could not overcome admission by government which had prepared the memorandum that Rule relating to secrecy of proceedings and disclosures occurring before grand jury was applicable. Fed.Rules Crim. Proc. rule 6(e), 18 U.S.C.A.; Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.

3. Mandamus — 172
Prohibition — 28

Fact that rule relating to secrecy of proceedings and disclosures occurring before grand jury applied to government memorandum in civil antitrust action was not dispositive of issue presented by petition for writ of prohibition and for writ of mandate to seal document, as secrecy that surrounds grand jury proceedings is not absolute in nature. Fed.Rules Crim. Proc. rule 6(e), 18 U.S.C.A.; Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.

4. Grand Jury — 41

Violation of traditional grand jury secrecy should only be permitted upon showing of particularized and compelling need. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

5. Grand Jury — 41

Whether need exists to permit violation of traditional grand jury secrecy is matter designedly left initally to discretion of trial judge, and in absence of an absolute prohibition against disclosure an exercise of judicial discretion is manifestly required. Fed.Rules Crim. Proc. rule 6(e), 18 U.S.C.A.

6. Grand Jury — 41

If reasons for maintaining grand jury secrecy do not

apply in given situation or apply only to an insignificant degree, party seeking disclosure should not be required to demonstrate a large compelling need. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

7. Grand Jury — 41

If district judge determined on examination of government memorandum prepared for criminal antitrust action that references to grand jury proceedings were so particularized that future grand jury witnesses might become inhibited if memorandum was disclosed in civil antitrust suit, district judge could delete references to witnesses' names or take any other action which best would maintain documents' substance while protecting anonymity of witnesses. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.; Sherman Anti-Trust Act, § 1 et seq. as amended 15 U.S.C.A. § 1 et seq.

8. Mandamus — 176
Prohibition — 30

Court of Appeals in civil antitrust suit reviewed government memorandum prepared in criminal antitrust case and deleted such portions of memorandum as it deemed necessary in respect to policy considerations behind rule of grand jury secrecy. Fed.Rules Crim. Proc. rule 6(e), 18 U.S.C.A.; Sherman Anti-Trust Act, § 1 seq. as amended 15 U.S.C.A. § 1 et seq.

Frank D. MacDowell, William MacD. Miller, Hill, Farrer & Burrill, Los Angeles, Cal., Gordon Johnson, San Francisco, Cal., James Baldwin, Los Angeles, Cal., Paul Haerle, Thelen, Marrin, Johnson & Bridges, San Francisco, Cal., Jesse R. O'Malley, Edward J. Riordan, Musick, Peeler & Garrett, Oliver F. Green, Paul,

Hastings, Janofsky & Walker, John J. Hanson, John H. Sharer, Shari L. Nelson, Chester A. Skinner, Gibson, Dunn & Crutcher, Los Angeles, Cal., for petitioners.

William H. Orrick, Jr., Asst. Atty. Gen., Lionel Kestenbaum, Elliott H. Moyer, Attys., Dept. of Justice, Washington, D.C., for respondent.

Joseph L. Alioto, Maxwell M. Blecher, Matthew P. Mitchell, San Francisco, Cal., for "No-Joint" plaintiffs, real parties in interest.

John Joseph Hall, Los Angeles, Cal., for "Perovich" plaintiffs, real parties in interest.

Thomas C. Lynch, Atty. Gen. of Cal., Wallace Howland, Asst. Atty. Gen. of Cal., Mervin R. Samuel, Michael I. Spiegel, Deputy Attys. Gen. of Cal., San Francisco, Cal., for State of California as amicus curiae.

Beofre POPE, BARNES and ELY, Circuit Judges.

BARNES, Circuit Judge.

This is a petition for wirt of prohibition and for writ of mandate (either or both, in the alternative). Petitioners seek to reseal a government memorandum which the district court has determined to be a proper object of federal discovery proceedings. This court's jurisdiction to grant the requested relief is derived from the "All Writs" statute, 28 U.S.C. § 1651.

The government document in dispute has been ordered unsealed for the use of plaintiffs in presently pending civil antitrust actions involving the concrete and coated steel pipe industry. The document had previously been prepared for sentencing purposes in the criminal antitrust proceeding from which these civil actions originate. Petitioners are corporations and corporate officers who had been indicated for violations

of Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as other individuals who assert they testified before the grand jury which returned the indictments.

The indictment against a portion of the present petitioners had been returned on March 10, 1964. On March 30, 1964, the defendants, over objection by the government, were permitted to plead *nolo contendere.* Upon acceptance of these pleas, Honorable Albert Lee Stephens, Jr., United States District Judge, before whom the pleas were made, directed counsel for the defendants and the government to submit confidential reports to the probation officer, to facilitate his role as an advisor to the court in the sentencing process.

Pursuant to the above directions, the government prepared a "Memorandum of Government Relating to the Imposition of Sentences and Fines" which was transmitted to the probation officer. This document, though not a grand jury document, was admitted by the government to contain information within the purview of the grand jury secrecy provision of Rule 6(e) of the Federal Rules of Criminal Procedure. That rule provides in pertinent part:

> "*Secrecy of Proceedings and Disclosure.* Disclosure of matters *occurring before the grand jury* [emphasis added] other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding * * *."

The government, however, recognized the

propriety of the district court judge exercising his discretion to permit the defense counsel to inspect the memorandum so long as the memorandum was filed under seal in the criminal cases. The criminal cases were subsequently concluded with the imposition of sentences.

Prior to the termination of the criminal proceedings, six private treble damage suits had been commenced against those defendants who had been indicted for criminal violations of the Sherman Act. Subsequent to the imposition of sentences in the criminal proceedings, plaintiffs in the civil actions sought access to the above mentioned government memorandum. To this end, the private plaintiffs served a deposition *subpoena dueces tecum* on Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division. The government responded by requesting by motion that Judge Stephens modify the sealing order so as to permit plaintiffs access to the memorandum and to allow for the quashing of the *subpoena duces tecum* that had been served on Mr. Disney. The matter came before Judge Stephens who, on his own initiative, transferred the motion for hearing before Judge Harry C. Westover, before whom the civil antitrust cases were pending.

Judge Westover ruled that the sealing order should be vacated and the subpoena quashed. On October 6, 1964, an order to this effect was entered.

The question presented for our consideration is whether the district court in so ordering disclosure, committed an abuse of discretion in permitting civil plaintiffs access to a government memorandum which had been sealed because of its references to grand jury proceedings.

[1] A preliminary matter is raised in the brief of

respondents (plaintiffs in the pending civil actions). They contend that the government memorandum is not in any way protected by the cloak of secrecy of Rule 6(e). The essence of respondent's argument is that Rule 6(e) was intended only to protect the actual transcript of the grand jury proceedings. We do not read Rule 6(e) in so limited a manner. Under respondents' construction of the Rule, any document prepared *after* the grand jury proceedings—even a detailed summary or other exact reiteration of what transpired before the grand jury—would be outside the protection of Rule 6(e). Such a construction would peel back in its entirety the cloak of secrecy that presently surrounds the proceedings. Lawmakers have not yet seen fit to allow such a wholesale disregard for the traditional secrecy of the grand jury.

[2] In addition to misconstruing the scope of Rule 6(e), respondents argue the inapplicability of the Rule without any first-hand knowledge of the extent to which the memorandum unveils what transpired before the grand jury. Respondents seek to mininize the admission by the government to the effect that its memorandum clearly comes within the protective policy of Rule 6(e). We do not see how respondents' conjectural estimates as to the extent to which the memorandum reflects grand jury proceedings can overcome the admission by a co-party in interest, and a co-party that had in fact prepared the memorandum, that Rule 6(e) was applicable. All parties who were given the opportunity to inspect the document in question are unanimous in their opinion that the policy issues of grand jury secrecy were put in issue by this request for access to the document's contents.

[3] But the fact that the Rule 6(e) applies to the

government memorandum is not dispositive of the issue presented by this petition. The secrecy that surrounds the grand jury is not absolute in nature. Rule 6(e) itself expressly provides that matters occurring before the grand jury can be disclosed where the court so directs. The question thus remaining, and the real question here presented, is whether the district court abused its discretion in ordering a disclosure in the present case.

Petitioners eloquently argue in their briefs that the unsealing order of the district court violates our traditional notions of grand jury secrecy. By the government's admission, the presentencing memorandum contains direct references to "testimony," presumably given before the grand jury; to permit its disclosure to the public, argue petitioners, would destroy the cloak of secrecy. Petitioners recognize, however, as they must, that the right to maintain secrecy of grand jury proceedings is not an absolute one. They assert that in order to dispense with the secrecy a "particularized and compelling need" must be demonstrated. For example, we believe petitioners would recognize that were a grand jury witness subsequently indicted for perjury on the basis of his grand jury testimony, notions of fair play and justice would require that he have an opportunity to examine the grand jury transcript. Similarly, petitioners would, we believe, concede the right of a United States Attorney charged with contempt for his conduct before the grand jury to examine the transcript of those proceedings. In the facts of the present case, however, petitioners see no compelling need for disclosure such as exists in the above examples.

[4-6] We agree with petitioners that a violation of the traditional grand jury secrecy should only be permitted upon a showing of "particularized and compelling need." But we cannot treat this test *in vacuo*. We must

take recognition first of the fact that whether such a "need" exists is a matter designedly left initially to the discretion of the trial judge. In the absence of an absolute prohibition against disclosure, an exercise of judicial discretion is manifestly required. Secondly, it must be kept in mind that, in making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy considerations for grand jury secrecy as they apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need. This view of the necessity for a court to perform such a weighing process is amply demonstrated, we believe, by the remarks of Mr. Justice Brennan in his dissenting opinion in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S.395, 403, 79 S.Ct. 1237, 1242, 3 L.Ed.2d 1323 (1959):

> "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance whould further the fair administration of criminal justice."

Our task of examining the policy considerations behind grand jury secrecy is facilitated by the universal adherence to the reasons expounded in *United States v. Amazon Ind. Chem. Corp.* 55 F.2d 254 (D.Md.1931), to-wit:

> "(1) To prevent the escape of those whose

> indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the tiral of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he had been under investigation, and from the expense of standing trial where there was no probability of guilt."

These reasons have been consistently quoted with approval. See, e.g., *United States v. Procter & Gamble*, 356 U.S. 677, 681 n. 6, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954).

In applying these policy reasons for secrecy to the facts of the present case, it immediately becomes apparent that the first three reasons have no relevance. As noted by the State of California in its *amicus curiae* brief, the memorandum was not prepared or filed until subsequent to the entry of the *nolo* pleas, and the motion to unseal followed the complete termination of the criminal proceedings. The grand jury thus had completed its investigation and returned its indictments long before the memorandum was prepared or its disclosure was sought by respondents. The fifth policy reason stated in *Amazon* is not appropriate to the present case because indictments were returned against all of the corporate petitioners and six of the individual petitioners. This leaves as the only basis for a compelling reason to maintain the

traditional grand jury secrecy that of insuring untrammeled disclosure by *future* grand jury witnesses.

Respondents contend that the policy of secrecy for the purpose of encouraging untrammeled testimony is inapplicable to the present case because those whom the witness most had to fear have already inspected the government memorandum, viz., their own employers.

[7] Petitioners seek to rebut this contention with evidence showing that witnesses fear retaliation from numerous sources other than their employers. We think there is some little validity to the contentions of each of the litigants as to what inhibits prospective grand jury witnesses. But we feel that, in the present setting, such issue is not controlling. We have examined the memorandum. We are conviced that if, on examination of the memorandum, the district judge determined that the references to the grand jury proceedings were so particularized that *future* grand jury witnesses might become inhibited if this present memorandum is disclosed, the district judge could, with little effort, delete the references to witness names or take any other action which best will maintain the document's substance while protecting the anonymity of the witnesses. Cf. *United States v. Grunewald*, 162 F.Supp.621, 622 (S.D.N.Y.1958).

[8] Because this approaches a matter of first impression, however, we have taken upon ourselves the task of "policing" the memorandum. This task would ordinarily be undertaken by the trial court. Having examined the document in camera as the trial court might have done, we have deleted such portions of the memorandum as we have deemed necessary in respect to the policy considerations behind the rule of secrecy of grand jury investigations. We have returned five originals of the document, as deleted (but without

disclosing the deletions), to the District Court for filing, without seal, in the five actions below; retaining one copy as so revised for our own Court files, and retaining all excised copies in our own files, under seal.

We realize that the need of the present respondents for disclosure is not as pressing or consistent with the notions of justice as it is, for example, in the perjury and contempt illustrations we allude to above. Yet, we cannot say the respondents' need is illusory. This court's opinion in *Olympic Refining Co. V. Carter*, 332 F.2d 260 (1964), *cert. denied* November 9, 1964, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175, typifies judicial appreciation of the benefits of a liberal discovery procedure. The facts in the present case lend additional support to the liberal discovery ruling, for here the document in question is of government origin and the party opposing disclosure has had an opportunity to inspect its contents.[1] It therefore seems highly inequitable and averse to principles of federal discovery to allow one party access to a government document and not the other. It is particularly inequitable when the policy reason for denying the other party access to the document is essentially inapplicable to the given situation. We cannot say that the district court judge has abused his discretion by ordering the document unsealed.

The petition is denied, and the district court order to unseal the government memorandum is sustained, subject to the modifications required by this opinion.

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[1]Counsel for petitioners assert that they alone, not their clients, had access to the memorandum. But knowledge of opposing counsel in itself prejudices respondents. Moreover, petitioners' counsel were not precluded from conveying what they learned from their inspection of the memorandum to their clients.